Filed 2/27/19 In re J.S. CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re J.S., a Person Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. F.N., Defendant and Appellant.	F077868 (Tulare Super. Ct. No. JJV069360F) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Hugo J. Loza, Judge.

Roshni Mehta, under appointment by the Court of Appeal, for Defendant and Appellant.

Deanne H. Peterson, County Counsel, John A. Rozum, Chief Deputy County Counsel, and Abel C. Martinez, Deputy County Counsel, for Plaintiff and Respondent.

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INTRODUCTION

This dependency case involves a biological father's attempt, on the eve of the Welfare and Institutions Code section 366.26[1] hearing, to receive reunification services and placement of his infant son, J.S. We conclude the dependency court acted within its discretion in denying appellant's request.

However, as respondent concedes, the dependency court failed to inquire as to whether appellant had any reason to believe J.S. was an Indian child under the Indian Child Welfare Act (ICWA). (See § 224.2, subd. (b).) We decline to speculate as to what a proper ICWA inquiry would have uncovered.

For these reasons, we remand for ICWA compliance and otherwise affirm.

FACTS

In January 2018, the Tulare County Health and Human Services Agency (the "Agency") received a referral indicating that both J.S. and his mother, C.S. ("Mother") tested positive for methamphetamines at the time of J.S.'s birth the day prior.

Mother identified three men as possible fathers of J.S., one of which was appellant, F.N ("appellant"). Appellant was an inmate at North Kern State Prison.

By the next day, J.S. was experiencing withdrawals in the hospital. That day, Mother visited J.S. one time, and only for fifteen minutes. The Agency decided to seek a protective custody warrant because J.S. was Mother's third drug-exposed baby. A protective warrant was issued, but Mother could not be located.

On January 4, 2018, the hospital informed the agency that they were going to call Mother so J.S. could be discharged. On January 5, 2018, the hospital informed the Agency that Mother did not contact the hospital, and J.S. needed to be discharged. The Agency responded to the hospital that morning and placed J.S. in protective custody. J.S. was placed with his maternal aunt and uncle that day.

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[1] All subsequent statutory references are to this Code unless otherwise noted.

The Agency filed a juvenile dependency petition on January 3, 2018. The Agency then filed an amended petition on January 8, 2018. The amended petition identified appellant as J.S.'s alleged father. The petition contained allegations under subdivisions (b)(1), (g) and (j)[2] of section 300. Specifically, the petition alleged that Mother used methamphetamine; Mother could not be located; J.S. tested positive for methamphetamines; and appellant is incarcerated and cannot arrange for adequate care of the child.

At the detention hearing, the court appointed counsel for appellant and ordered DNA testing. The court ordered J.S. detained and scheduled a jurisdiction hearing for January 30, 2018.

Jurisdiction/Disposition Report

The Agency's jurisdiction/disposition report noted that appellant was an alleged father and therefore not eligible for services. The report said that if he is found to be the biological father, the Agency would still recommend that no services be granted because it would not be in J.S.'s best interest. The report noted appellant was not eligible for parole until September 2018. The report also recommended denying services to Mother. (See § 361.5, subds. (b)(10)–(11), (b)(13).)

ICWA Inquiry

The report indicated Mother had told a social worker that J.S. does not have any known Indian ancestry. The report also stated that "ICWA inquiry has not yet been made of the alleged father, [Appellant] who is incarcerated at North Kern State Prison."

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[2] Subdivision (b)(1) concerns children who have suffered or are at substantial risk of suffering serious physical harm or illness as a result of inadequate supervision or neglect. Subdivision (g) concerns, *inter alia*, children (1) who have been left without any provision for support, (2) whose parent(s) has been incarcerated and cannot arrange for the care of the child, or (3) whose parent(s) cannot be located. Subdivision (j) concerns children whose siblings have been abused or neglected under (a), (b), (d), (e), or (i), and themselves face a substantial risk of abuse or neglect under those subdivisions.

Appellant's Criminal History

The report detailed appellant's criminal history as follows:

"The last booking date is on 09-22-17 and released on 10-03-17 Charges: (VCF350575)

"PC29800(A)(1) - Possess Firearm by Felon, PC30305(A)(1) - Person Unlawfully Possess Ammo.

"Subject's CDCR#: [] Admitted on 10-03-17 North Kern State Prison Parole Eligible: 09/2018.

"There are ten more booking dates from 06-16-17 back to 12-10-06. The charges include: Person Unlawfully Possess Ammo, Possess Firearm by Felon, Armed in Possession of Controlled Substance, Receiving Stolen Property, Burglary: Residential First Degree, Disturbing the Peace, Assault with Deadly Weapon, Great Bodily Injury, Drive When Privilege Suspended, Vandalism, Having Concealed Firearm on Person, Battery: Simple, Resist Arrest, Having Concealed Firearm in Vehicle.

"SUSTAIN:

"Case #: VCF350575 Filed On: 04-28-17 Charges: PC29800(a[])](l) - Felon in Possess of Firearm Felony Nolo Plea on 09-25-17 State Prison 2 years, Don't Own/ Possess Weapons/Firearms, Prohibited Firearm Notice to Def.

"Case #: VCM313234 Filed On: 02-18-15 Charges: PC602.5(b) - Enter Non Commercial Dwelling Misdemeanor, PC594(A) - Vandalism Dismissal on 11-30-15.

"Case #: VCF223409 Filed On: 06-24-09 Charges: PC245(a)(l) - Assault: Deadly Weapon other than Firearm Felony Nolo Plea on 10-15-09 County Jail: 365 days. Probation: Formal - 3 years.

"Case #: TCM 191240 Filed On: 09-10-07 Charges: VC 14601.1(a) - Drive Suspended Not Driving Ability Misdemeanor Guilty Plea on 10-03-07 County Jail: 90 days, Fines. Probation: Summary –

"Case#: TCM190397 Filed On: 08-24-07 Charges: VC14601(a) - Drive While Suspended Misdemeanor Guilty Plea on 10-03-07 Fines, County Jail: 90 days. Probation; Summary – 36 months.

"Case #: TCM 180174 Filed On: 02-28-07 Charges: PC594(a) - Vandalism Misdemeanor Guilty Plea on 05-16-07 County Jail: 30 days, Fines. Probation; Summary - 36 months.

"Case #: TCM176562 Filed On: 01-09-07 Charges: PC 148(a)(1) - Obstruct Public officer Misdemeanor Nolo Plea on 04-04-07 Fines. VC 14601.1 (a) - Drive Suspended Misdemeanor Nolo Plea on 04-04-07. Probation; Summary - 36 months.

"Case #: TCM 176138 Filed On: 12-30-06 Charges: PC 12025(a)(2) - Carry Firearm Capable of Being Concealed Misdemeanor Nolo Plea on 04-04-07. VC 14601.1 (a) - Drive Suspended Misdemeanor Nolo Plea on 04-04-07 Fines, County Jail: 60 days. PC148(a)(l) - Obstruct Public officer Misdemeanor Nolo Plea on 04-04-07. Probation: Summary - 36 months."

The report was served on appellant in prison.

Appellant's Waiver of Appearance

Appellant executed a waiver of his right to appear at the January 30, 2018, jurisdictional hearing. In the waiver, appellant indicated he did not want to attend the hearing, nor did he want to participate by videoconference or telephone.

Jurisdiction/Disposition Hearing

Neither Mother nor appellant appeared at the jurisdictional/dispositional hearing on January 30, 2018.

During the hearing, the court asked J.S.'s maternal aunt and uncle if they were "aware of any Indian heritage on mom's side of the family or any of the other alleged fathers" (which would include appellant). They said, "No."

The court ruled appellant was "not entitled to services at this time." The court also denied services to Mother.

The court found the allegations of the petition true, ordered J.S. removed, and set a section 366.26 hearing for May 24, 2018.

DNA Test Results

DNA test results filed April 25, 2018, indicated appellant is J.S.'s biological father. The DNA test results were served on appellant the day prior.

Events Surrounding Section 366.26 Hearing and Section 388 Petition

According to a correspondence from Chuckawalla Valley State Prison dated May 8, 2018, appellant did not want to attend the section 366.26 hearing in person but did want to participate by telephone.

The Agency filed a section 366.26 report on May 17, 2018. The report indicated J.S. was "very attached" to his caretakers, maternal aunt and uncle. J.S.'s half-sibling, two-year-old G.S., was in the same home and was in the process of being adopted by maternal aunt and uncle. The report recommended terminating the parental rights of Mother and appellant.

At the hearing on May 24, 2018, appellant's counsel indicated that she did not make it clear to appellant that he could not participate by telephone. Counsel indicated appellant was getting out of prison on July 11, 2018, and wanted the section 366.26 hearing continued until after that date. The court set a continued hearing for July 19.

On June 6, 2018, appellant filed a request to change a court order. (See § 388.) Appellant stated he wanted to reunify with J.S. and requested family reunification services. Appellant also asked that his home be evaluated and considered for relative placement. The court set an initial hearing on the request for June 21, 2018, but continued it to July 19, 2018 – the same day as the section 366.26 hearing.

The Agency opposed appellant's section 388 request. The Agency identified six reasons the request was not in J.S.'s best interests:

> "1) The father is currently incarcerated in state prison and has been for the past 8 months. Prior to that, he was in and out of county jail. The father has not raised a child in quiet [*sic*] some time and his current children are not being raised by him either.
>
> "2) The father has an extensive criminal history including substance abuse increasing his risk to reoffend based on his history.
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> "3) The child is already placed in an approved non-confidential relative Family Resource Home with his maternal aunt and uncle [].

"4) The child is currently placed with his dependent half-sibling … who was previously ordered into a permanent plan of adoption and placed in the same home.

"5) The child has bonded with his current relative caregivers and sibling. The child has contact with all his close maternal family members.

"6) The caretakers are open to discussing supervised visitation between the child and father, after the adoption, should be father show stability, sobriety, and no further criminal involvement."

At the July 19, 2018, hearing, the Agency told the court, "I think we need to make ICWA inquiry as to [appellant.] I don't think it's ever been made." The court, however, did not make an ICWA inquiry as to appellant.

Appellant was called to testify. He said he learned J.S. was his biological child "[one] month ago." Upon learning the news, appellant's wife "called, started trying to get involved." Appellant said he had three children "of my own" (in addition to J.S.).

Appellant's prior employer, a company that installs fences, rehired him when he was released from prison. Appellant said he is now attending church.

When asked why he was incarcerated, appellant said, he was "a felon in possession of a gun." Appellant said the gun "was put away up on top of my attic, in the closet."

Court's Ruling

The court observed that there had indeed been some changes in appellant's circumstances: He was now out of prison, back with his wife and family, and had a job. However, the court concluded that "for me to make a finding that it would be in the best interest of the child to put off the question of what happens to this minor long term in the hopes that you will continue to do well would not be fair to the child. Because the law also requires that we look to stability and permanency." The court denied appellant's section 388 petition[3] and terminated appellant's parental rights.

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[3] After the court said, "The Court is going to deny that 388," county counsel said, "May I add just a couple comments just for the record? I do agree with the Court that in

DISCUSSION

I. The Dependency Court did not Abuse its Discretion in Denying Appellant's Petition Under Section 388

Appellant argues the court abused its discretion in denying his section 388 petition.[4]

A. Law

"There are three types of fathers in juvenile dependency law: presumed, biological, and alleged. [Citation.]" (*In re P.A.* (2011) 198 Cal.App.4th 974, 979.) "A presumed father is a man who meets one or more specified criteria in [Family Code] section 7611." (*Ibid.*) "A biological … father is one whose biological paternity has been established, but who has not achieved presumed father status …." (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.) "A man who may be the father of the child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an 'alleged' father. [Citation.]" (*Ibid.*)

With certain exceptions, a dependency court *shall* order child welfare services to (1) the child's mother and (2) presumed fathers upon removal of the child. (§ 361.5,

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legally speaking the Court could not grant reunification services to the biological father." The court responded, "That's the other problem. See, the other thing is in the law, to grant reunification services, you would have to be designated a presumed father." As appellant observes, this is not quite accurate. The court may – though it is not required to – grant services to a biological father. (§ 361.5, subd. (a).) However, we find this misstatement harmless. The court had already denied the section 388 petition. At most, this was merely an *additional* reason the court offered for denying the petition. "In any event, we review the lower court's ruling, not its reasoning; we may affirm that ruling if it was correct on any ground. [Citations.]" (*In re Natasha A.* (1996) 42 Cal.App.4th 28, 38.)

[4] Appellant argues, in the alternative, that the statutory dependency scheme was unconstitutional as applied to him in this case. Appellant did not make that argument below and cannot raise it now. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221–222.) Appellant urges us to "relax this rule," but we decline to do so.

subd. (a).) In contrast, the court *may* order services for a biological father, "if court the court determines that the services will benefit the child." (*Ibid.*)

"[A] biological father is not entitled to custody under section 361.2, or reunification services under section 361.5 if he does not attain presumed father status prior to the termination of [the] reunification period …." (*In re Zacharia D., supra,* 6 Cal.4th at p. 454, fn. omitted.) "Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue." (*Ibid.*)

Under section 388, a parent can petition the court to change, modify or set aside a prior order. (§ 388, subd. (a)(1).) The petition must be made "upon grounds of change of circumstance or new evidence." (*Ibid.*) The court shall order a hearing held "[i]f it appears that the best interests of the child … may be promoted by the proposed change of order …." (§ 388, subd. (d).) Thus, the parent must not only demonstrate that circumstances have changed, but that those changed circumstances "would warrant further consideration of reunification." (*In re Marilyn H., supra,* 5 Cal.4th at p. 310.) In other words, the "parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

We review the juvenile court's decision to deny appellant's section 388 petition for abuse of discretion. (*In re Casey D., supra,* 70 Cal.App.4th at p. 47.)

B. Analysis

Applying the legal principles stated above, we conclude the juvenile court acted within its discretion when it denied appellant's section 388 petition for placement, reunification, and services.

The Agency does not dispute that some of appellant's circumstances changed: He had been "elevated" from an alleged father to a biological father, and he had been

released from prison. However, showing changed circumstances is only part of the burden a section 388 petitioner must carry. They must also show the relief requested is in the best interests of the child. The fact that appellant was released from prison to live with his wife and children, and that he got a job, are certainly positive developments in his life. But J.S. had been living with his maternal aunt and uncle for seven and a half months (virtually his entire life) before the hearing on the section 388 petition. J.S.'s half sibling also lived in the home. In contrast, J.S. had never lived with appellant and had no bond with him whatsoever. Moreover, instead of attending the jurisdiction hearing, appellant declined to even participate by telephone. Appellant was served with test results showing he was J.S.'s biological father in April 2018. Yet, appellant did not even seek presumed father status prior to July 2019[5] – nearly two months after the section 366.26, hearing had been set. At that late juncture, appellant's showing was insufficient to counterbalance the interest J.S. had in a permanent and stable home with the only people who had ever cared for him on a daily basis.

We conclude by emphasizing the standard of review. The only question before us is whether the dependency court abused its discretion. Dependency cases often involve tough decisions like whether to redirect a case off the path to permanency and back to the reunification stage. Dependency courts must weigh competing interests of substantial importance. But that job is largely theirs, not ours. We review those decisions to ensure they remain within the broad parameters of sound discretion. While this case – like many others – involves important arguments on both sides, the dependency court's conclusion was clearly not an abuse of discretion.

[5] It is not entirely clear appellant even sought presumed father status in July. His counsel said, "He wishes to be considered – given a chance to be considered a presuming [*sic*] father." Counsel did not request that the court actually make a ruling on that issue.

II. We Must Order a Limited Remand for Proper Inquiry Under ICWA

A dependency court has an "affirmative and continuing duty to inquire" whether a child is or may be an Indian child under the ICWA. (§ 224.2, subd. (a).) "At the first appearance in court of each party, the court shall ask each participant present in the hearing whether the participant knows or has reason to know that the child is an Indian child." (§ 224.2, subd. (c).)

Here, appellant's first physical appearance in court was at the July 19, 2018, hearing. Counsel for the Agency told the court, "I think we need to make ICWA inquiry as to [appellant.] I don't think it's ever been made." However, no such inquiry was made at the hearing.

The parties agree the court erred in failing to make an ICWA inquiry of appellant. However, the Agency contends appellant should be foreclosed from raising the issue on appeal because there is no indication J.S. has Indian ancestry. The Agency cites *In re Rebecca R.* (2006) 143 Cal.App.4th 1426, where the Court of Appeal held that a father's failure to even claim Indian ancestry before the appellate court foreclosed him from seeking reversal on the grounds of insufficient inquiry. However, as the Agency observes, case law is split on the subject and our court is on the other side of the split. Our opinions have held that when ICWA inquiry is not done, we will not "speculate about what [the parent's] response to any inquiry would [have been] …." (*In re J.N.* (2006) 138 Cal.App.4th 450, 461, fn. omitted.) Consequently, we will remand this matter for a proper ICWA inquiry. If that inquiry does not yield evidence that J.S. is or may be an Indian child, the order denying appellant's section 388 petition and terminating his parental rights shall remain effect.

DISPOSITION

The matter is remanded to the dependency court to comply with the inquiry provisions of the ICWA. If proper inquiry yields evidence J.S. may be an Indian child, the Agency shall comply with ICWA, including its notice provisions. If proper inquiry

does not yield evidence J.S. may be an Indian child, the orders denying appellant's section 388 petition and terminating his parental rights shall remain in effect. In all other respects, the orders are affirmed.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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DETJEN, J.

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DESANTOS, J.